MOTION FILED

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No. 10-267

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA *ex rel.*
PATRICIA HAIGHT AND
IN DEFENSE OF ANIMALS,
Petitioners,

v.

CATHOLIC HEALTHCARE WEST, et al.,
Respondents.

On a Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICIAE CURIE* AND *BRIEF AMICIAE CURIE* OF KATHERINE O'CONNELL AND CHRIS MOYERS IN SUPPORT OF PETITIONERS

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September 21, 2010

Comes Daniel Bartley, Counsel for Katherine O'Connell and Chris Moyers, and moves the Court for leave to file "Brief of *Amici Curiae* Katherine O'connell and Chris Moyers in Support of Petitioners."

In support of this motion, movants refer to the "Interest of *Amici*" section of the subject Brief.

Petitioners have consented to the filing of this brief, but the Respondents have withheld their consent.

September 21, 2010

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*[1]

Amici Dr. Katherine O'Connell and Dr. Chris Moyers are relators in a *qui tam* action pursuant to the False Claims Act (FCA), 31 U.S.C. § 3729, et seq., before the Ninth Circuit Court of Appeals, *United States ex rel. O'Connell, et al. v. Chapman University,* Case No. 07-56864.

Dr. O'Connell's and Dr. Moyers' *qui tam* action, brought in the United States District Court for the Central District of California, alleged that Chapman University, in violation of conditions of participation in taxpayer-funded tuition programs, misrepresented to the United States Department of Education ("ED"), the United States Department of Defense ("DOD"), and the State of California, respectively, the number of faculty-student contact

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[1] *Amici curiae* represent that their own counsel wrote this brief and that no person or entity other than *amici curiae* and their counsel made a monetary contribution to the preparation or submission of this brief. Petitioners have consented to the filing of this brief, but the Respondents have withheld their consent.

hours of instruction that Chapman was teaching to students whose tuition was paid, in whole or in part, using ED and DOD funds.[1]

On October 23, 2007, the District Court granted Chapman University's motion for summary judgment, and on October 24, 2007, the District Court entered a final appealable judgment in favor of Chapman.

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[1] *Amici*'s case has been recognized as one of a triad of ground-breaking high-profile higher education *qui tam* cases holding errant institutions responsible for false certifications of eligibility to participate in taxpayer-funded tuition programs. See "Litigation U.", *Chronicle of Higher Education*, Van Der Werv, Martin, Aug. 4, 2006, referring to *United States ex rel O'Connell, et al. v. Chapman University*, 2006 WL 1562231 (C.D. Cal. 2006); *United States ex rel. Main v. Oakland City University*, 426 F.3d 914, *reh. den.* (7th Cir. 2005), *cert. den.* (April 17, 2006); *United States ex rel. Hendow v. University of Phoenix*, 461 F.3d 1166, *reh. den.* (9th Cir., 2006), *cert. den.* (April 23, 2007). *Amici*'s counsel represented the *qui tam* relators in both the *O'Connell* case and the *Hendow* case. The *Hendow* case resulted in the recovery of substantial taxpayer funds from the notorious University of Phoenix. See "Qui Tam Suit Against University Nets $78.5 Million Settlement," Moser, Kate, *Law.com*, Dec. 15, 2009.

On December 21, 2007 – 58 days after entry of such final judgment – Dr. O'Connell and Dr. Moyers noticed their appeal. At that time, *Amici's* counsel knew about, and relied upon, the Ninth Circuit rule in *Haycock*, expressly permitting any party to a *qui tam* FCA action 60 days to appeal under F.R.A.P. Rule 4(a)(1)(B). *United States ex rel. Haycock v. Hughes Aircraft Co.*, 98 F.3d 1100 (9th Cir. 1996), *cert. denied* 520 U.S. 1211 (1997).

With the intention of having the District Court grant appropriate Rule 4(a)(5)(A)(ii) relief if *Haycock's* 60-day rule should be determined inapplicable to *Amici's* appeal, *Amici's* counsel, out of an abundance of caution, took the extraordinary step of expressly calling the timeliness issue to the attention of the District Court, via the following paragraph in *Amici's* Notice of Appeal:

> This Notice of Appeal, filed within sixty (60) days of the final judgment, is timely pursuant to Fed. R. App. P. 4(a)(1) and *U.S. ex rel. Haycock v. Hughes Aircraft Co.*, 98 F. 3d 1100, 1102 (9th Cir. 1996), opinion supplemented, 99 F.3d 1148 (9th Cir. 1996).

On June 8, 2009, the Supreme Court determined that, in False Claims Act *qui tam* actions in which the United States has declined to intervene, the 30-day period for filing a notice of appeal applies, rather than the extended 60-day

period applicable in actions involving the United States as a party. *United States ex rel. Eisenstein v. City of New York*, 129 S. Ct. 2230 (2009).

On June 29, 2010, in response to *Eisenstein*, Dr. O'Connell and Dr. Moyers filed with the Ninth Circuit a motion for Rule 4(a)(5)(A)(ii) relief and for a stay pending the Ninth Circuit's ruling in *Haight*.

On September 9, 2009, the Ninth Circuit issued an order staying *Amici's* appeal, pending issuance of the mandate in *United States ex rel. Haight v. Catholic Healthcare West*, Appeal No. 07-16857 ("*Haight*"). The Ninth Circuit in such order asserted that within 30 days after issuance of the mandate in *Haight*, Dr. O'Connell and Dr. Moyers shall file a response to appellees' motion to dismiss or move for appropriate relief.

On September 8, 2010, citing to *Eisenstein*, 129 S. Ct. 2236 n. 4, and to *Haight*, 602 F.3d 949 (9th Cir. 2010), at 953, the Ninth Circuit Court of Appeals declared "Eisenstein applies retroactively and requires dismissal of these appeals" and proceeded to deny *Amici's* motion for Rule 4(a)(5)(A)(ii) relief and dismissed *Amici's* case.

ARGUMENT

1. The Ninth Circuit's decision in *Haight*, denying Rule 4(a)(5)(A)(ii) relief to Petitioners, has impact upon *Amici's* case and upon other cases, foreclosing all avenues of relief for the 30-day extension, including consideration of constitutional principles.

Amici file this amicus brief to make clear to the Supreme Court that the impact of the Ninth Circuit's decision denying Rule 4(a)(5)(A)(ii) relief in the *Haight* case goes far beyond that one single case. Such decision in *Haight* directly impacts *Amici's* case. Further, the Ninth Circuit's decision not to recognize and enforce Rule 4(a)(5)(A)(ii) protections affects untold legions of appellants in the future.

The Ninth Circuit's *Haight* decision effectively does away with Rule 4(a)(5)(A)(ii) relief for litigants who, *in substance*, have filed paperwork justifying a 30-day extension of time in which to appeal.

Rule 4(a)(5)(A)(ii), as codified, alleviates the injustice that otherwise would occur from mistaken reliance upon a Circuit Court of Appeals decision establishing a 60-day deadline for noticing an appeal. Rule 4(a)(5)(A)(ii) addresses circumstances where, as here, the appellants have shown "excusable neglect" or "good cause."

2. There appear to be conflicts among the courts over the question of deeming a notice of appeal filed during the 30-day "grace period" as a timely motion for an extension of time.

Numerous cases cited by Petitioners (which, for sake of brevity, and to avoid redundancy, are not repeated here) address how the courts are allowed latitude to interpret a civil filing to be whatever it needs to be, its label notwithstanding. Given that letters are seen as notices of appeal, and letters are seen as motions for an extension of time, there is no reason to consider a notice of appeal NOT to be a request for an extension of time.

This is so true in *Amici's* case, where *Amici* in their Notice of Appeal expressly called the district court's attention to *Haycock*. *Amici* in their Notice of Appeal presented everything that would have been needed in a motion, except a formal request to extend time in a jurisdiction where such time extension relief simply was not needed.

There is a conflict between the criminal and civil treatment of the rule allowing latitude in interpreting a civil filing to be whatever it needs to be, label not withstanding. In a criminal case, constitutional issues *require* the courts to consider a notice of appeal filed in the grace period to be a motion for an extension of time. Why should that

be different in the *civil* arena? Especially the civil arena in which *fraud against the taxpayers* is being alleged?

Although the *circuits* may have adopted a uniform rule of rejecting this theory in the *civil* context, it is hardly a unified voice. In fact, this is just the kind of issue that the Supreme Court could and should decide, as illustrated by what the Second Circuit did in *Eisenstein*.

Petitioners Haight and In Defense of Animals present an excellent discussion about the disagreement over the logic behind the interpretation of Rule 4(a)(5)(A)(ii).

The circuits have followed this rule for the wrong reason. They all think the 1979 rule change was to require that the motion be filed in the district court. In fact, the 1979 amendment was solely to correct the problem pointed out by Judge Friendly that a 30-day extension is not enough when the motion is filed during the 30 days, but the judge does not grant the motion until after the 30 days. Technically, if the notice was not filed until the judge ruled, it was too late. So the rule was amended to allow the extension beyond the 30 days, if a motion was filed during the 30 days. This is all very logical, but should have no impact on our question, whether the court of appeals can deem the notice to be a timely motion.

Counsel for Petitioners did an excellent job tracing the history of Rule 4 changes. Petitioners' case citations (which *Amici*, for sake of brevity and to avoid redundancy, do not repeat here) strongly support Petitioners' right to relief.

Rule 26(b) vested the Court of Appeals with the power to grant a 30-day extension under Rule 4(a)(5), without the necessityo f a motion in, or remand to, the district court.

Rule 26(b) provides power to extend the time to appeal as authorized in Rule 4, because the "unique circumstances" doctrine enables the Court of Appeals to consider that a Rule 4(a)(5)(A)(ii) jurisdictional extension was *automatically granted by judicial action* at the commencement of the initial 30-day appeal period, and because Petitioner's notice of appeal may be deemed an unopposed meritorious Rule 4(a)(5) motion.

The courts that have looked at this problem preceding the 1997 amendment to Rule 26(b) expressly acknowledge the authority of the appellate court to extend the time for filing a notice of appeal as permitted in Rule 4. If anything, the rule change in 1997 was meant to correct the problem of the cases that say notices of appeal cannot be construed as a motion for Rule 4(a)(5)(A)(ii) relief.

3. Because Petitioners filed their notice of appeal in express reliance upon the 60-day rule enunciated in *Haycock*, the Ninth Circuit should have construed their notice of appeal as the functional equivalent of a Rule 4(a)(5)(A)(ii) motion.

It is extraordinary that a federal court retroactively changes filing deadlines for *anything*, much less the all-important filing deadline for noticing an appeal.

Here, in addition to the direct notice afforded on the face of *Amici's* notice of appeal, the Ninth Circuit was apprised by that *Amici* had expressly relied upon the 60-day rule unequivocally enunciated in *Haycock*.

The Ninth Circuit should have construed the relators' respective notices of appeal, filed between the 30th and 60th days, as the functional equivalent of a Rule 4(a)(5)(A)(ii) motion for relief based upon excusable neglect or good cause. By not doing so, the Ninth Circuit elevated form over substance, and permitted technicality to prevail over merit.

4. The Supreme Court in *Eisenstein* did not have before it the issue of use of use of Rule 4(a)(5)(A)(ii) as protection against harsh and unfair consequences for noncompliance with a filing deadline noticing an appeal.

In *Eisenstein*, the Supreme Court wrote of the "harsh consequences" imposed by the legislature's 30-day rule. *Eisenstein*, 129 S. Ct. 2236 n. 4. But nowhere in *Eisenstein* did the Supreme Court address whether the rules had established any mechanism for getting around such harsh consequences.

This is because the recognition and application of the protection afforded by Rule 4(a)(5)(A)(ii) was simply was NOT AN ISSUE before the Supreme Court in *Eisenstein* – the issue was never briefed, argued, or raised before the Supreme Court.

While *Eisenstein* determined retroactively that *Amici* and petitioners had only 30 days to notice an appeal, *Eisenstein* DID NOT bar corrective relief permitted under Rule 4(a)(5)(A)(ii), grounded in excusable neglect or good cause.

There is NO greater basis for excusable neglect or good cause than reliance upon a Circuit Court of Appeals opinion expressly prescribing a 60-day appeal period for a relator to appeal a *qui tam* case.

CONCLUSION

Amici Dr. O'Connell and Dr. Moyers urge the Court to recognize and avail Rule 4(a)(5)(A)(ii) to protect Petitioners (and, indirectly, *Amici*) from the harsh result dictated by their reasonable reliance upon the 60-day rule enunciated by the Ninth Circuit in its *Haycock* decision.

One of the most basic tenets of a civilization governed by laws rather than by men is diligent and consistent recognition and application of protections against retroactive changes in law. Rule 4(a)(5)(A)(ii) is just such a protection. Protection against sudden retroactive changes in law is one of the attributes of America that makes us a beacon for the rest of humanity.

Amici implore the Supreme Court to grant the petition for certiorari to address the protection afforded by Rule 4(a)(5)(A)(ii) and to ensure its uniform application.

Respectfully submitted,

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